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No. 06-1646

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In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) ("ACCA"), establishes a mandatory minimum sentence for a felon convicted of possession of a firearm if the defendant has three prior convictions for "serious drug offenses" or "violent felonies." A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). The question presented is:

Whether a court determining if a state conviction qualifies as a "serious drug offense" should look to the maximum term of imprisonment prescribed generally for the state offense, or must consider, in addition, particular facts of the case that could lead to an enhanced sentence under a broadly-applicable state recividist statute?

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STATEMENT

Respondent Gino Gonzaga Rodriquez was convicted as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), a defendant who violates Section 922(g) is subject to a mandatory 15-year sentence if he or she has three previous convictions for a violent felony or a serious drug offense. Section 924(e)(2)(A)(ii) defines a "serious drug offense," in part, as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law."

The government sought to invoke this sentencing enhancement on the basis of respondent's conviction under Washington law for delivery of a controlled substance, an offense for which Washington law generally prescribes a maximum sentence of *five* years. It contended that the conviction qualifies as a "serious drug offense" because Washington's recidivist enhancement statute—which was *not* applied to enhance the sentence imposed upon respondent for this conviction—must be considered in determining whether the "offense" is one "for which a maximum term of imprisonment of ten years or more" is prescribed by state law. Both courts below squarely rejected this argument, holding that this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), requires that the maximum term of imprisonment for the "offense" be determined on a "categorical" basis not tied to the particular facts of the case.

Contrary to the government's assertion, there is no conflict among the lower courts warranting this Court's attention. The government claims that the Seventh Circuit reached a conclusion contrary to the court below with respect to Section 924(e), but the Seventh Circuit was addressing a

different question regarding the applicability of Section 924(e), and the statement relied upon by the government was not necessary to the Seventh Circuit's decision. The Fourth Circuit decision invoked by the government expressly addresses only the same unrelated issue as the Seventh Circuit decisions. The government's reliance on the Fifth Circuit decision is wholly misplaced because it construed another federal statute with language very different from Section 924(e). Moreover, we have located only a single additional lower court decision—a district court ruling—addressing the issue presented by the petition. As Justice Frankfurter wrote over fifty years ago, it is "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). Review by this Court is not warranted.

1. Respondent pleaded guilty in 1995 to three offenses under Washington law relating to drug transactions. One of these offenses was a violation of Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv), each of which states that a person who violates the provision "may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both." See Pet. App. 33a.

Washington law contains a separate provision empowering courts to impose enhanced sentences for individuals convicted of multiple drug violations. Termed a "doubling statute," the measure states that upon conviction of "a second or subsequent offense," a defendant "may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Wash. Rev. Code § 69.50.408(a).

The relevant state sentencing guidelines in 1995 provided that the permissible sentencing range for respondent's offense was 43-57 months. See C.A. Supp. E.R.

128-29, 147-48, 182-83. Although the maximum potential sentence for any recidivist was ten years, the maximum possible sentence for respondent under state sentencing guidelines was 57 months. Respondent was sentenced to 48 months on this conviction. *State* v. *Rodriquez*, No. 95-1-01071-8, Judgment & Sentence (Wash. Super. Ct. Nov. 21, 1995).

2. Before the district court in the present case, the government argued that respondent's 1995 conviction qualified as a "serious drug offense" under Section 924(e) because the five-year term of imprisonment prescribed generally for the offense by Wash. Rev. Code § 69.50.401, combined with the doubling statute, produced a maximum possible term of imprisonment of ten years.

The district court rejected the government's contention. Pet. App. 18a-28a. "In determining whether a particular offense qualifies as a predicate offense for the [ACCA] enhancement," the district court ruled, "the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but 'looks only to the statutory definitions of the prior offenses.'" *Id.* at 19a (quoting *Taylor*, 495 U.S. at 600).

The court concluded that "on its face," Washington's "statutory definition of [respondent's] prior drug offenses do[es] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement" because it prescribes a maximum prison term of five years. Pet. App. 26a. It reasoned that the "separate" recidivist statute authorizing an optional sentencing enhancement did not "alter the maximum sentence available for the crime itself" (*id.* at 25a-26a), pointing to this Court's statement that "'recidivism does not relate to the commission of the offense.'" *Id.* at 27a (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 488 (2000)). Because respondent's conviction under Washington law did not qualify as a "serious drug

offense," the court concluded that the ACCA's automatic sentencing enhancement should not apply in this case.

3. The court of appeals unanimously affirmed. Pet. App. 1a-17a. Invoking "the 'familiar analytical model constructed by the Supreme Court in *Taylor*,'" the court of appeals held that "[f]or federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" *Id.* at 11a (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002)). The court observed that "the essence of [the government's request] is that we consider the offense and the sentencing enhancement together" (Pet. App. 16a), and squarely rejected that contention based on "the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes." *Id.* at 13a.

The court of appeals denied the government's petition for rehearing en banc, with no judge requesting a vote. Pet. App. 29a-30a.

ARGUMENT

The question presented regarding the meaning of Section 924(e)'s reference to "an offense * * * for which a maximum term of imprisonment of ten years or more is prescribed by law" has received scant attention from courts of appeals and district courts. The Ninth Circuit is the only court to have addressed the question in a case in which it was both briefed and essential to the court's holding. The other appellate decisions cited by the government involve cases in which the issue was not briefed and the court's statement was dicta; in which the court was interpreting a different sentencing enhancement statute with very different language; or in which the court was addressing a different question regarding

the scope of Section 924(e). Moreover, the government does not provide any evidence that the issue presented regarding Section 924(e) is creating confusion in the lower courts. Indeed, we have identified only a single additional district court decision addressing the question. Given the absence of a clear conflict among the lower courts and the lack of any indication of a pressing need for the Court to address the issue at this time, we submit that the proper course is to allow further consideration of the issue by the courts of appeals. In that way, if and when this Court decides to address the question, its decision will be aided by informed lower court opinions analyzing the issue. Review by this Court now simply is not warranted.

Moreover, the court of appeals' decision accords with this Court's precedent. The court below followed the approach of *Taylor*, *supra*, applying a "categorical" approach in determining whether an "offense" qualifies as an ACCA predicate. Because a recidivism enhancement is separate from the underlying substantive definition of the offense (see *Apprendi*, 530 U.S. at 488), the court below correctly considered only the sentence prescribed generally for the underlying offense, and not the sentence permissible based on the particular facts of this case.

A. There Is No Conflict Among The Courts Of Appeals With Respect To The Meaning Of Section 924(e) That Warrants This Court's Attention.

The government asserts that the decision here "conflicts" with rulings by the Seventh Circuit and is "in tension with" rulings by the Fifth and Fourth Circuits (Pet. 14). In fact, the Seventh Circuit's statement was dicta in cases in which the issue was not briefed. And the other courts' decisions, which the government acknowledges do not give rise to a conflict, do not even create tension: one involves a different statute and the other expressly addresses an entirely different

question regarding the scope of Section 924(e). There is no conflict necessitating review by this Court.

1. In *United States* v. *Henton*, 374 F.3d 467 (7th Cir.) (per curiam), cert. denied, 543 U.S. 967 (2004), the defendant had been convicted of possession of cocaine with intent to deliver, an offense that carried a maximum term of seven years under state law. Because enhancement under a separate recidivist statute could have produced a maximum term of fourteen years, the government argued that the offense qualified as a "serious drug offense" under the ACCA.

The defendant in *Henton* did not advance the argument, adopted by the court of appeals here, that enhancement due to recidivist statutes is irrelevant in determining the maximum term for "an offense" under Section 924(e). Rather, he asserted the very different contention that his prior conviction for possession with intent to deliver cocaine did not qualify as an ACCA predicate offense *because the prosecutor in the prior state action did not seek a recidivist enhancement in the indictment*. *Henton*, 374 F.3d at 468; Br. of Def. App. David L. Henton, No. 03-3657 at 9-11 (7th Cir. filed Dec. 16, 2003), *available at* http://www.law.yale.edu/documents/pdf/Clinics/henton.pdf. The defendant claimed that the prosecutor's failure to seek enhancement deprived him of required "due notice" that his actual exposure to imprisonment was fourteen years. Without such notice, the defendant argued, the state conviction could not qualify as an ACCA predicate offense. *Henton*, 374 F.3d at 468.

That is how the Seventh Circuit understood the defendant's argument: "Henton argues that the state's failure to expressly invoke the extended-term provision of the statute meant that he was not subject to it * * *." *Henton*, 374 F.3d at 469. The court rejected this argument because "the [state] statute does not contain any prerequisites, other than recidivism, to qualify for the extended term." *Ibid.*

The defendant in *Henton*, therefore, did not raise—and the Seventh Circuit consequently did not consider—the issue decided by the court below: whether a separate recidivist enhancement *ever* may be considered in determining the maximum term of imprisonment for "an offense" under Section 924(e). Because the defendant in *Henton* did not make this argument, the Seventh Circuit's broad statement that his eligibility "for up to fourteen years' imprisonment" qualifies the conviction as a "serious drug offense" simply cannot be read as a rejection of the argument adopted by the court below: the Seventh Circuit has not had an opportunity to consider that question. At most, it is dicta in *Henton* that is in tension with the decision below.

United States v. *Perkins*, 449 F.3d 794 (7th Cir.), cert. denied, 127 S. Ct. 330 (2006), involved the same issue as *Henton*. The defendant pointed to an Illinois statute "requiring judges to inform people who are pleading guilty about extra penalties for recidivism" (*id.* at 796), arguing that the state court's failure to inform him about the Illinois recidivist statute barred consideration of that statute in the federal proceeding. Like *Henton*, *Perkins* did not raise the issue reached by the court below. Br. of Def. App. Alonzo Perkins, No. 05-3163 (7th Cir. filed Jan. 26, 2006), *available at* http://www.law.yale.edu/documents/pdf/Clinics/perkins.pdf.

Because the Seventh Circuit was not faced with and hence did not decide the question presented here, the Seventh Circuit would not view itself as bound by any language in *Perkins* and *Henton* relating to that issue. See, *e.g.*, *Walker* v. *Abbott Lab.*, 340 F.3d 471, 476 (7th Cir. 2003) (declining to follow previous resolution of statutory interpretation issue when that issue was not squarely before the court and "since our decision * * * every circuit court to address the issue, five in all, have held" that the issue should be resolved differently); *United States* v. *Doherty*, 969 F.2d 425, 428 (7th Cir. 1992) (noting that "language in passing does not

establish the law of the Circuit" and declining to follow previously endorsed statutory reading that had since been rejected by courts of appeals that had "expressly addressed" same issue). Should the Seventh Circuit be presented with the argument advanced in this case, it may well find the analysis of the Ninth Circuit persuasive.[1] No genuine conflict having ripened between these Circuits, there is none for this Court to resolve.

2. Citing the per curiam opinion *Mutascu* v. *Gonzales*, 444 F.3d 710 (5th Cir. 2006), the government claims (Pet. 15) that the Fifth Circuit rejected "the approach" of the court below. That is simply wrong.

Mutascu was an immigration case in which the Fifth Circuit interpreted 8 U.S.C. § 1101(a)(43)(G), a portion of the statutory definition of "aggravated felony" providing that "aggravated felony" includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." Significantly, the statute further states that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law * * *." *Id.* § 1101(a)(48)(B). Because the individual *actually had been sentenced* to a term of one year in prison, based in part on the applicable recidivist statute, the court of appeals concluded that the

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[1] Certainly the reasoning in *Henton* and *Perkins* does not require the Seventh Circuit to reject the Ninth Circuit's determination regarding the different question presented here. Those rulings focused narrowly on whether failure to comply with state procedural safeguards is relevant to whether prior state convictions may serve as predicate offenses under the ACCA. They did not address whether a court determining whether an offense is a "serious drug offense" should look only to the statutory maximum for the offense, rather than to sentencing enhancements that turn upon the particular facts of the case.

offense satisfied the "aggravated felony" definition. Indeed, the Fifth Circuit squarely rested its decision on this statutory language: "The statute states in 8 U.S.C. § 1101(a)(48)(B) that the term of imprisonment in (a)(43)(G) is at least the term 'ordered by a court of law.'" *Mutascu*, 444 F.3d at 712.

This dramatically different statutory text makes *Mutascu* irrelevant in interpreting Section 924(e), which includes no provision defining "term of imprisonment" to include the sentence actually pronounced by the court in the particular case. See 18 U.S.C. § 924(e)(2)(A)(i) (defining a "serious drug offense" under state law as a drug offense for which "a maximum term of imprisonment of ten years or more is prescribed by law"). This material difference between Section 924(e) of the ACCA and the relevant provisions of the immigration statute demonstrate that *Mutascu* does not conflict with the opinion below.[2]

3. Finally, the government argues that *United States* v. *Williams*, 326 F.3d 535 (4th Cir. 2003), is in "tension" with the result here. Pet. 16. The Fourth Circuit, however, addressed only the procedural question decided by the Seventh Circuit in *Henton*: whether the prosecutor's failure to seek a recidivist enhancement at the time of the underlying conviction—and thus to comply with the procedural requirements specified in the recidivist statute—precludes a finding that the offense was one for which the maximum term of imprisonment was ten years, even though the

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[2] The Fifth Circuit responded to the defendant's invocation of *Corona-Sanchez* by noting that it "*previously* disagreed with *Corona-Sanchez*" in another case involving interpretation of neither the immigration provision at issue in *Mutascu* nor Section 924(e). *Mutascu*, 444 F.3d at 712 (emphasis added). But the decision in *Mutascu* rests squarely on the particular language used by Congress in the immigration law—language not present in Section 924(e).

defendant was eligible for enhancement that *could have* produced a sentence of ten years.

Reaching a different result from the Seventh Circuit, the court concluded that "[t]o subject [the defendant] to an enhancement now, based upon a sentence that he could have received only after the exercise of procedural safeguards, would compromise not only [the defendant's] statutory rights, but his due process rights as well." *Williams*, 326 F.3d at 540. It therefore held that the defendant's prior conviction did not qualify as an ACCA predicate offense.

In sum, no square circuit conflict exists with respect to Section 924(e). The Seventh Circuit in *Henton* and *Perkins* and the Fourth Circuit in *Williams* decided an issue different from the one addressed by the court below. And the Fifth Circuit's decision in *Mutascu* is based on entirely different statutory language. That, in turn, leads to two conclusions. First, the issue plainly is not a frequently occurring question of national importance that has divided the courts of appeal. [3]

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[3] Two days before we filed this brief, the First Circuit in *United States* v. *Duval*, No. 05-2163, 2007 WL 2253505 (1st Cir. Aug. 7, 2007), interpreted the separate ACCA provision defining "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," to require a court to take into account recidivist enhancement of the sentence for the offense under state law, regardless of whether state law has classified the crime as a misdemeanor rather than a violent felony. *Id.* at *16 (quoting 18 U.S.C. § 924(e)(2)(B)). That holding does not create a conflict with the decision below. To begin with, the First Circuit regarded it as crucial that, as a consequence of the enhancement, Maine law treated the defendant's conviction as a felony rather than as a misdemeanor under state law. *Id.* at *16. That treatment had many legal consequences in addition to its effect on the defendant's sentence, leading the First Circuit to conclude that "[i]t would be unusual if a court could not consider Duval's conviction as a felony for ACCA when Maine law would recognize it as such for [these manifold other] state-law purposes." *Ibid.* In the present case, by

The government's inability to identify a square conflict demonstrates that this issue is not a question that frequently arises. Indeed, we have identified only a single additional district court decision involving the issue.[4]

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contrast, the potential, unapplied enhancement did not affect the status under state law of respondent's conviction. There accordingly is every reason to believe that the First Circuit would decide *this* case as did the court below.

In addition, *Duval* does not create a literal conflict with the decision below because it was construing a different provision of ACCA from the one at issue here. The statutory text interpreted by the First Circuit (Section 924(e)(2)(B)) differs significantly from the language of Section 924(e)(2)(A)(ii). Section 924(e)(2)(B) defines "violent felony" as "any *crime* punishable by imprisonment for a term exceeding one year, or any *act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device* that would be punishable for such term if committed by an adult" (emphasis added). In contrast to its use of "offense" to define "serious drug offense" in section 924(e)(2)(A)(ii), Congress's use of the emphasized language in section 924(e)(2)(B) might well, in some circumstances, warrant considering the actual facts regarding the particular offense and particular defendant. The very fact that the language of the provisions differs in a way that might justify different interpretations, moreover, underscores the wisdom of permitting case law on the meaning of ACCA to continue to develop. Review now is not only unnecessary to resolve a genuine conflict about the meaning of section 924(e)(2)(A)(ii); it would also deprive the Court of the benefit of what additional cases might reveal about the complexities involved in looking outside of the offense of conviction to construe the meaning of various discrete provisions of ACCA.

[4] In *United States* v. *Hughley*, No. 04-01402, 2005 U.S. Dist. LEXIS 8612 (E.D. Tenn. Mar. 28, 2005), the district court did not consider or decide the issue presented here. The defendant had a previous drug conviction in Tennessee. The state court had the option of sentencing the defendant as a recidivist, thereby exposing him to a maximum of ten years in prison. *Id.* at *3-4. However,

Second, the lower court decisions do not provide this Court with sufficient information about the varying contexts in which the issue might arise. In order to ensure that its decision is fully informed, the Court should permit additional consideration of the issue by the lower courts.

B. The Decision Below Accords With The Text Of The Statute And This Court's Precedent.

The government asserts (Pet. 7) that the critical point in determining whether a conviction was for a "serious drug offense" within the meaning of Section 924(e) is the maximum sentence for which the defendant was "eligible." But the contours of this "eligib[ility]" test are not at all clear. Thus, the government says that the particular facts of the case should be considered if they trigger a generally applicable state law that enhances sentences for recidivists, and therefore *increase* the maximum sentence. But the facts of the case must be disregarded entirely if they *decrease* the maximum permissible sentence—for example, due to the operation of generally applicable state sentencing law. See Pet. 12-13 n.3. The courts below correctly rejected this vague, one-way ratchet approach to determining whether "an offense" is one for which a "maximum term of imprisonment of ten years or more is prescribed by law," an approach that has no support in the language of the statute or this Court's cases. Pet. App. 16a.

Even though this case involves a question of statutory interpretation, the government does not begin with the language of the statute. Section 924(e) defines a "serious

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doing so would have required violating procedural safeguards under Tennessee law. Therefore, the maximum sentence possible was six years. Applying *Williams*, the court found that this prior conviction did not qualify as an ACCA predicate offense. *Id.* at *4.

The other cases cited by the government (Pet. 17) arise under immigration statutes and the Sentencing Guidelines, which—as we have explained—may involve very different statutory language.

drug offense" as "an offense" for which a "maximum term of imprisonment of ten years or more is prescribed by law." Congress's focus was on the offense, not the particular characteristics of the case or of the offender. See *Taylor*, 495 U.S. at 600 (language of Section 924(e)(1) refers to "crimes falling within certain categories, and not to the facts underlying the prior convictions"). That stands in sharp contrast to the immigration law provision construed in *Mutascu*, which expressly makes relevant the particular sentence imposed for the prior offense. See pp. 8-9, *supra*.[5]

This Court in *Taylor* adopted a "formal categorical approach" to determining whether a state conviction qualifies as an ACCA predicate offense under Section 924(e). 495 U.S. at 600. Courts are to "look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*; see also *ibid.* ("look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions"); *ibid.* ("look only to the statutory definitions of the prior offenses" and not "consider other evidence concerning the defendant's prior crimes").

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[5] The government's reliance (Pet. 9) on *United States* v. *LaBonte*, 520 U.S. 751 (1997), is wholly misplaced. *LaBonte* involved a statute directing the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term *authorized for categories of defendants*" meeting specified characteristics. 28 U.S.C. § 994(h) (emphasis added). That language focusing on the prison term authorized for "categories of defendants" obviously is different from the text of Section 924(e), which references "an offense" and does not mention "categories of defendants." And it was the language of Section 924(e) that the Court interpreted in *Taylor*. Again, the government is ignoring the specific—and very different—language that Congress used in the two provisions.

The Court derived this rule by considering the language of Section 924(e), the relevant legislative history, and the "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 600-01. These considerations apply with equal force here.

Whether a defendant was eligible for a recidivist enhancement under the specific provisions of the applicable state law when he or she committed a state offense is a fact particular to that defendant. The government's test would require courts to delve into the requirements of the state enhancement statute and the particular facts regarding the defendant. But *Taylor* directs courts to disregard facts specific to particular cases and individual defendants and instead consider only the offense with which they were charged. The offense is either categorically sufficient to qualify as an ACCA predicate, or, in the alternative, it is categorically insufficient to be a predicate offense. By requesting the court below to consider the particular facts underlying respondent's conviction, the government seeks a rule that is the precise opposite of the one recognized in *Taylor*.[6]

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[6] The government's attempt (Pet. 10) to distinguish *Taylor*, arguing that it applies only to the elements of a crime and not to the length of a sentence, makes no sense. The *Taylor* Court specifically held that courts should not look at facts specific to the state conviction in determining whether it constitutes an ACCA predicate offense. 495 U.S. at 600. A recidivist enhancement necessarily turns on the existence of prior convictions, facts that are specific to each individual defendant. The attempt by the United States to conflate "facts underlying the prior convictions" (*ibid.*) with "elements of a crime" (Pet. 10) is illogical. As is evident here, the fact that a defendant is a recidivist is most certainly a case-specific "fact[] underlying the prior conviction" and not a generic element of the offense, whose applicability may be ascertained simply by reading the statutory text.

Moreover, the government's proposed rule is internally inconsistent—the government advocates taking account of the particular facts of a case only when they increase the maximum permissible sentence. Facts that would decrease the maximum permissible sentence are off-limits.

Thus, the government notes that "respondent's range under Washington's guidelines system was 43-57 months of imprisonment for each of his controlled-substance convictions in Washington." Pet. 13 n.3 (citing C.A. Supp. E.R. 128-29, 147-48, 182-83).[7] In *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis added), this Court held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Accordingly, the maximum sentence for which respondent would be eligible was the guidelines maximum of 57 months.

But the government argues that courts should not look outside the specific offense to limitations imposed by state-sentencing guidelines. Pet. 13 n.3. It proposes a rule that is a one-way ratchet: look outside the period of imprisonment of the underlying offense only when state sentencing law will *increase* the maximum term of imprisonment. The reasons for this differential treatment are not at all clear.[8]

The rule urged by the United States is also at odds with this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S.

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[7] We are not arguing here that the judgment below should be upheld because respondent's maximum sentence was limited to 114 months. Rather, we are pointing out the bizarre consequences of the government's self-contradictory rule.

[8] Of course, to the extent that the statute is ambiguous, the rule of lenity compels the construction adopted by the court below. See *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (explaining that the rule of lenity requires that a court construe "an ambiguous criminal statute * * * in favor of the accused").

466 (2000), and *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In *Apprendi*, this Court succinctly stated that "'recidivism does not relate to the commission of the offense.'" *Id.* at 488 (quoting *Almedarez-Torres*, 523 U.S. at 244). The Court has distinguished between the underlying conviction and a sentencing enhancement for recidivism. The decision below respects this long-recognized distinction.

* * * *

This case presents an issue that has not been squarely considered by any other court of appeals. There is no evidence that the issue recurs frequently, it is not dividing the lower courts, and the question simply has not percolated sufficiently to aid this Court's review. Finally, the approach taken by the Ninth Circuit is fully consistent with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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